AUVI PTE. LTD., RE

HIGH COURT, SINGAPORE
CHAO HICK TIN J
[ORIGINATING MOTION NO. 96/88]
15 NOVEMBER 1991

TRADEMARKS: *Rectification - Application to expunge the trademark from Register - "AUVI" mark vs. "AUVI" logo - Whether mark independently created - Whether artistic work - Meaning of 'persons aggrieved' - Equitable or legal ownership - Discretion of Court - Copyright Act 1911, s. 5 - Copyright Act 1987 - Trade Marks Act ss. 11, 15(1), 38, 39(1)(a), 40(1).*

From 1974, the applicants were sellers and distributors of high fidelity equipment who maintained a corporate logo entitled "*AUVI*" (the *AUVI* logo) which was never used in as a trade mark on any of their products. It is alleged by them that they have acquired the ownership of the copyright of the logo's reputation and goodwill as a result of the frequent use of the "*AUVI*" logo in their advertisements and stationery.

The respondents are also dealers in electronic equipment who secured the registration of a similar "*AUVI*" mark (the *AUVI* mark) in the Trade Marks Register on 7 September 1983. It was contended by the respondents that they had been using the mark for 14 years and averred that the idea for the mark was conceived by them.

In 1987, the applicants became aware of the registration of the *AUVI* mark in Class 9 and applied to have the *AUVI* mark expunged from the Trade Marks Register or in the alternative to expunge the trade mark as wrongfully remaining on the Register.

It was submitted by the applicants that the mark should not be registered as its registration was contrary to the law because it infringed their copyright in the *AUVI* logo.

The issues before the Court were whether

(i) the respondent created the *AUVI* mark independently or copied the logo of the applicants

(ii) there was originality in the logo and whether the logo was an artistic work which enjoyed the copyright protection under the Copyright Act 1911;

(iii) the applicants are 'persons aggrieved' under s. 39(1)(a) of the Trade Marks Act;

(iv) the applicants were legal owners who were entitled to rectification of the register and

(v) there was delay by the applicants in instituting these proceedings.

Held:

[1] The substantial similarity between the *AUVI* logo and the *AUVI* mark gives rise to a *prima facie* inference of copying by the respondents. The inconsistencies and the unsatisfactory nature of the respondents' testimony did not lend credence to their contention that they independently created the *AUVI* logo.

[2] In law, there could be infringement even though the imitation is not an exact replica and in this case the respondents have admitted that the logo and the mark are strikingly similar.

[3] All that needs to be shown is that the author created it and has not copied it from another and that he has expended towards its creation a substantial amount of skill or labour. The *AUVI* logo constituted an artistic work and thus enjoyed copyright protection under the

Copyright Act 1911 as the applicants have shown that they instructed artists to create the logo, who later executed a formal assignment in favour of the applicants. Further the testimony of the artist was not challenged by the respondents.

[4] As the copyright in the logo was vested in the applicants, and as he logo was associated with the applicants, the applicants are 'persons aggrieved' as they are entitled to protect their copyright in the logo and to have the *AUVI* mark removed from the Register.

[5] To determine whether the *AUVI* mark is wrongfully remaining on the Register, the relevant date would be the date on which the proceedings were commenced. On that date, the applicants were already the owner of the copyright in the logo and therefore are entitled to ask for rectification of the Register. The assignment by the artist vested legal ownership in the copyright in the work in the applicants.

[6] To vary a mark from a device mark to a wordmark would involve a change which substantially affects the identity of the mark and would clearly amount to allowing a new mark to be entered on the Register without giving third parties a chance to oppose. The Court was not prepared to let the respondents have the exclusive right to use the four alphabets, *AUVI,* without going through the normal process.

[7] Considering all the circumstances of the present case, there was no delay on the part of the applicants in coming to Court for reliefs and even if there were a delay, it is no bar to this present application.

[Plaintiffs' application granted]

Cases referred to:
KARO STEP Trade Mark [1977] RPC 255 ***(foll)***
King Features Syndicate Inc v. O & M Kheeman Ltd [1941] AC 417 ***(cit)***
L.B. (Plastics) Ltd v. Swish Products Ltd [1979] FSR 149 ***(cit)***
Motel 6 Inc v. No 6 Motel Ltd 127 DLR (3d) 267 ***(foll)***
Macmillan & Co Ltd v. Cooper (K & J) [1923] 40 TLR 186 ***(cit)***
British Northrop Ltd v. Texteam Blackburn Ltd [1974] RPC 57 ***(foll)***
Nicholas Advanced Vehicle Systems Inc v. Rees [1979] RPC 127 ***(foll)***
Stephenson, Blake & Co v. Grant, Legros & Co. [1916] 33 RPC 406 ***(foll)***
Ritz Hotel Ltd v. Charles of Ritz Ltd & Anor [1989] AIPC 38 ***(foll)***
Powell's Trade Mark [1984] AC 8 ***(foll)***
DAIQUIRI RUM Trade Mark [1969] RPC 600 ***(foll)***
Lever Bros Ltd v. Sunniwite Products Ltd. [1949] RPC 84 ***(cons)***
WELLS FARGO Trade Mark [1977] RPC 503 ***(cons)***
OSCAR Trade Mark [1979] RPC 173 ***(cons)***
Consort Trade Mark [1980] RPC 160 ***(cons)***
Re Arnold Palmer [1987] 2 MLJ 681 ***(cons)***
Merchant Adventures Ltd v. Griew & Co. Ltd. [1973] RPC 1 ***(cit)***
Bourne v. Swan & Edgar [1903] 1Ch 211 ***(cit)***
"Apollinaris" [1981] 2Ch 186 ***(cit)***

Legislation referred to:
Copyright Act 1911 [UK], s. 5
Trade Marks Act [Sing], ss. 11, 15(1), 38, 39(1)(a), 40(1)
Trade Marks Act [UK], s. 11

Other source referred to:
Kerly's Law of Trade Marks (12th Edn.), - para. 11-60

For the applicants - Kelvin Chia
For the respondents - Radakrishnan

JUDGMENT

Chao Hick Tin J:

This is an application to expunge a certain entry from the trade marks register.

The applicants, Auvi Pte. Ltd, are a private limited company which was incorporated in 1974. Their principal line of business relates to the sale and distribution of high fidelity equipment. They are the agents and/or distributors of a number of foreign brands of high fidelity and other household equipment. They do not manufacture any product of their own. The applicants maintain a corporate logo using the name "*AUVI*". The logo is shown in the annex hereto (hereinafter referred to as the "*AUVI* logo"). It has never been used by the applicants as a trade mark on any product.

The volume of business of the applicants has been substantial, rising from $2,547,626 in 1976 to $8,256,795 in 1986. The sales figures for 1986 were the latest audited figures available when they commenced these proceedings in 1988. They have, from time to time, advertised the products of which they are the agents/distributors in the media. Such advertisements became more extensive from 1984. The *AUVI* logo appeared in all their advertisements and in their stationery used in the course of trade, for example, invoices, letterheads, envelopes, package lists and receipts etc. They allege that by virtue of all these, they have acquired "a very substantial reputation and goodwill in their name and logo so that its use had .... come to mean the business of the applicants."

Through their managing director, one Yeo Kian Tee, the applicants stated that the *AUVI* logo was designed for them, on their specific commission, by one John Lee of Pro-Ads (Pte.) Ltd., in February 1976. John Lee was the managing director of Pro-Ads, who were the advertising agents engaged by the applicants to render advertising and promotional services. The *AUVI* logo was an original creation of John Lee and his team of design artists. The applicants accordingly contended that copyright subsists in the logo. John Lee died on 25 October 1985.

As regards the arrangement on ownership of the copyright, Yeo Kian Tee further said the following:

> The applicants no longer have the particulars of the express arrangements (if this in fact ever existed) between Mr John Lee, Pro-Ads and ourselves as to the ownership of such said copyright. The applicants have however always used the *AUVI* logo to the exclusion of both Pro-Ads and Mr. John Lee and neither Pro-Ads nor Mr. John Lee had used or sought to use the *AUVI* logo otherwise than in connection with advertising and promotional activities undertaken on behalf of the applicants. Pro-Ads and the estate of Mr. John Lee have further indicated that they are not asserting any rights to the *AUVI* logo as against the applicants and have prior to the commencement of the proceedings herein each executed an assignment of any copyright they might have in the *AUVI* logo to the applicant.

On 9 May 1988 both Pro-Ads and the estate of John Lee (deceased) separately executed a formal deed of assignment in favour of the applicants. It was explained to me that an assignment was also obtained from the estate of John Lee in order to prevent any argument that the copyright could have vested in John Lee rather than Pro-Ads.

Trade mark No. 4767/83, a copy of which is also shown in the annex, was registered on 7 September 1983 in favour of two persons, Miss Seah Siew Tee and Chai Foh Min, who were trading as partners under the style of AV Electronics (Sabah) Trading Co. (hereinafter referred to as "the *AUVI* mark", "Miss Seah", "Chai" and "AV Electronics", respectively.) Miss Seah and Chai are the respondents herein. The *AUVI* mark was advertised in the *Gazette* on 27

September 1985 and an *errata* published on 30 May 1986. AV Electronics commenced business on 2 April 1982 and was registered on 7 May 1982. Miss Seah and Chai later incorporated a company by the name of Auvisonic Import and Export Pte. Ltd., which from August 1984 took over the sales of *AUVI* products from AV Electronics.

However, it would appear that it was only in March 1987 that the applicants became aware that the respondents had secured the registration of the *AUVI* mark in class 9 in respect of "cleaning tapes for recording heads of audio and video apparatus, pre-recorded tapes, radio-cassette tape recorder, loudspeakers and headphones and parts ... "This awareness came about when the respondents issued a warning notice in the newspaper against counterfeiting their *AUVI* mark. Thus this action.

In these proceedings the applicants originally sought to have the *AUVI* mark expunged on the ground that it was entered without sufficient cause in that:

(a) its use by the respondents was and is contrary to law in that it was and is an infringement of the copyright owned by the applicants in (the) logo ...;

(b) its use being an infringement of the applicants' copyright as aforesaid the respondents could not properly claim to be the proprietors of the trade mark; and

(c) its use was likely to deceive and cause confusion and thus was disentitled to protection in a Court of justice.

At the closing stage of the hearing, while Counsel for the respondents was submitting, I gave leave to the applicants to amend the motion to add an alternative ground to expunge the trade mark, that is, the entry is wrongfully remaining on the register. Counsel for the applicants explained that the amendment was made necessary at that juncture because the respondents' Counsel in his final submission raised for the first time the point that at the time when the respondents applied for the registration of the mark (that is, September 1983), if copyright did exist in the *AUVI* logo, the applicants were not then the legal owners of the copyright in the work, but only the equitable owners and as such they were not entitled to institute these proceedings to expunge the trade mark on the ground that it was entered without sufficient cause. The applicants' Counsel pointed out that nowhere in the various affidavits filed by the respondents have the latter questioned the applicants' ownership of the copyright in the logo otherwise he would have asked for leave to amend the motion at the commencement of the hearing. The applicants' Counsel also told the Court that he would not be asking for leave to introduce additional evidence on account of the amendment. As the proposed amendment would not entail the tendering of additional evidence by either the applicants or the respondents and as I did not think that the proposed amendment would cause any injustice or unfairly prejudice the respondents, I granted leave to the applicants to amend.

In his affidavit (filed in January 1989) Chai explained that he has been using the *AUVI* mark for some fourteen years since 1974, first in Sarawak, then in Sabah and Malaya. It was used in Singapore since 1982. In 1974, he was trading through a Malay-owned company in Sarawak called Syarikat Sinar Dahlia. The *AUVI* mark was then used on radio cassette cleaners, headphones and transistor radios which were manufactured for Chai by a company in Taiwan called Sinwan Industrial Co. Ltd. (Sinwan). Chai deposed that "the idea for the trade mark was conceived by (him) after he saw it in a Japanese magazine or brochure sometime before 1974". He thought that the mark would be a nice trade mark for audio products since it was derived from the words "audio" and "video". In 1976, he established a sole proprietorship in Kuching called Eastern (Sarawak) Trading Company (Eastern Sarawak) and he continued to

use the mark. He gave a photocopy of the mark to Miss Seah when they were considering the registration of the mark. He is not able now to locate the advertisement from the Japanese magazine.

Chai further deposed that on the commencement of these proceedings in 1988, he had tried without success to locate the documents to show the use of the *AUVI* mark on his goods. All that he could manage to find were four invoices of Eastern Sarawak dated early 1977.

He said that in or about 1982 after he met Miss Seah, they decided to go into business together in Singapore. AV Electronics was established as a result. It dealt in electrical goods including audio and video assessories using the *AUVI* mark. Because the sales of the *AUVI* goods were encouraging, they decided to register the mark to protect it against counterfeits.

As would be apparent, this application to remove the *AUVI* mark is founded essentially on the fact that it infringes the copyright of the applicants in the *AUVI* logo. The applicants say that under s. 11 of the Trade Marks Act (the Act), a person can apply to register a mark only if he can claim that he is the proprietor of the mark. Further, s. 15(1) provides that:

> it shall not be lawful to register as a trade mark or part of a trade mark any matter the use of which would, by reason of its being likely to deceive or cause confusion or otherwise, be disentitled to protection in a Court of justice or would be contrary to law or morality, or any scandalous design.

The applicants submit that as the *AUVI* mark infringes the copyright of the applicants in the logo, the *AUVI* mark ought not to be registered as its registration would be contrary to law. They say that the respondents could not and cannot claim to be the proprietors of the *AUVI* mark as the mark infringes the copyright of theirs. The applicants rely on this passage of Whitford J in *KARO STEP Trade Mark* [1977] RPC 255 at 274:

> any such claim must, in my view, be bad if in fact on copyright grounds some third person is going to be in a position to stop the applicant using the mark at all. The proprietors of a mark in which copyright exists can, I think, only be the owners of the copyright in the mark.

The alternative ground for the application to expunge is that the registration of the *AUVI* mark could give rise to confusion, that is, the public might think that the *AUVI* products of the respondents are in fact manufactured by the applicants. But there is hardly any real evidence of that. The fact that the applicants did not even know of the existence of the *AUVI* mark until the warning notice was issued by the respondents is entirely inconsistent with the assertion that the *AUVI* mark caused or could cause confusion. Counsel for the applicants has also conceded that there is no evidence of any deception. Accordingly, I do not think that the alternative ground to expunge the mark can be sustained.

On the evidence and the submissions of both Counsel the main issues which this Court has to decide are these:

(i) Did Chai create the *AUVI* mark independently or did he create it by copying the *AUVI* logo of the applicants.

(ii) If the Court finds that the respondents did copy the *AUVI* logo of the applicants, was there originality in the logo, and was the logo an artistic work which enjoyed copyright protection under the Copyright Act 1911.

(iii) Are the applicants "persons aggrieved" within the meaning of s. 39(1)(a) of the Trade Marks Act to enable them to institute these rectification proceedings.

(iv) If the applicants are persons aggrieved, are they entitled to ask for rectification on the ground that the entry of the *AUVI* mark on the register was made without sufficient cause when they were, at that time, not the legal owners of the copyright in the logo but only owners in equity.

(v) Whether there was delay on the part of the applicants in instituting these proceedings after knowledge of the *AUVI* mark and, if there was, whether this Court ought to exercise its discretion in favour of the respondents by not ordering the removal of the mark.

First Issue: Independent Creation or Copy

The first issue is one of fact: did Chai in fact obtain the idea of the mark from a Japanese magazine sometime before 1974 as he alleged, or did he design the mark by copying from the applicants' logo. To test the veracity of the statements in the affidavits of the respondents, I granted the applicants' request to cross-examine the respondents. Accordingly, Chai and Miss Seah were extensively cross-examined and were also re-examined by their own Counsel. No similar application was made by the respondents to cross-examine the deponents of the affidavits filed in support of the applicants' case.

In so far as Miss Seah's evidence is concerned all that she said about the origin and creation of the mark is entirely hearsay. She has no first hand knowledge of those things other than what she heard from Chai.

As regards the testimony of Chai, I would first like to make the following general observations:

(i) There are numerous inconsistencies in his evidence.

(ii) All too often he said he could not remember or his answers were evasive.

(iii) He struck me as a witness who did not make any serious search into his own records to assist the Court to establish the truth; and if indeed he did make such a search, I would be inclined, having regard to the manner in which he answered questions, to think that the results of the search did not favour him.

Let me now highlight some of the unsatisfactory aspects of Chai's testimony. Chai said that he had been ordering goods from Sinwan of Taiwan since 1974 for his business in Kuching. Those goods carried the *AUVI* mark. But he has not been able to produce a single invoice/ receipt or other documents from Sinwan evidencing the fact that Sinwan had been manufacturing *AUVI* goods for Chai since 1974. The documents of Sinwan which the respondents managed to produce were dated October 1983 and not earlier. No one from Sinwan filed any affidavit to support the respondents' assertion. One Mr Chang of Sinwan was supposed to testify for the respondents, but he failed to turn up. All that Chai could produce were four invoices dated January and February 1977 (Exh. R6) of Eastern Sarawak. But his evidence before me as to how he obtained the four invoices is contradictory. At first he said he obtained these invoices from the customers. Curiously these four invoices were not the original copies of the invoices, but were carbon copies. Later he said that he found the four invoices in a box. At one point he said he picked the four invoices because he considered them most important as if to suggest he had more. If that were true, and bearing in mind the nature of this action, one wonders why he picked only four invoices to give to his solicitors. At an earlier part of the hearing (see NE 46; it may be noted that the hearing of this case stretched over three periods - (February 1989, March 1991, and September 1991) he said that he had other invoices but he had to look for them. On re-examination by his

Counsel he said the four invoices were all that he had. Interestingly, there was a fire at his store in Sarawak on 8 February 1989. That was after the first adjournment. He did not mention about the fire at the hearing in March 1991. At the hearing in September 1991 he said the fire had damaged some of the documents. While there is objective evidence to show that there was such a fire, the only proper inference I could draw would be that the fire did not destroy anything meaningful or relevant.

The four invoices were dated January and February 1977 and they were tendered to show that as early as in 1977 Chai was already dealing in goods with the *AUVI* mark. But there is also evidence to show that on 6 August 1976 Chai had already sold his business in Eastern Sarawak to another person. One, therefore, wonders why he kept on issuing invoices in the name of a firm which was no longer his. He offered some explanation. I find what he did most extraordinary and the explanation difficult to accept.

Turning to the circumstances in which he created the mark, Chai deposed in his affidavit that he got the idea for the mark from a Japanese magazine. In his evidence given in March 1991 (NE 55) he said he cut out the letterings from the Japanese magazine and brought the letterings closer together. (It should be noted that in his affidavit he mentioned nothing of the cutting out from the Japanese magazine.) He did not do any other design work on the mark. He also said he "took the shape of the Japanese mark and (he) re-drew it on a fresh piece of paper." He liked the shape in which the alphabets were presented. He kept the cuttings until 1982. On further cross-examination (in September 1991) he said he did some design work on the alphabet "I"; he broke it up as shown in the *AUVI* mark. I should observe that even on this last aspect (whether he did any design work on the alphabet "I"), he contradicted himself in evidence; as he appeared to me to be rather uncertain.

The two respondents' evidence as to what appeared on the Japanese advertisement, from which Chai copied (or cut from) to create the mark, is also at variance. Miss Seah said that there were some Japanese words but no pictures (NE5). One wonders how she knows that when she was only given a photocopy of the cuttings by Chai. Chai at first said that the advertisement had illustrations of electrical appliances (NE33). Later (at NE52), Chai said the advertisement had something else on it but he could not remember what it was. On re-examination (in September 1991), Chai said that the advertisement had words in English but no pictures.

Another curious aspect of Chai's evidence is this. If, in fact, he had been using the mark on his products since 1974, why was it necessary for him to give a photocopy of the cuttings to Miss Seah; a product package would have sufficed to enable Miss Seah to do the needful. If he had been using the mark since 1974, why was there a need for him to retain the original cuttings until 1982/83 and then subsequently to lose them.

Chai said in evidence that the first time he saw the applicants' logo was when he saw it on a name card given to him by a friend. When asked if he showed the card to Miss Seah he replied that he was so angry that he threw the name card away. This act of throwing the card away is totally inexplicable. If the *AUVI* mark was really his creation, and he had been using the mark since 1974, why did it not occur to him that it might well be the other side who copied his mark. I would have expected Chai to keep the name card as evidence and pursue those who copied his mark. Towards that end, I would have thought that he would have handed it to Miss Seah for onward transmission to their solicitors who would no doubt be interested to compare the mark and the logo to see the similarities and study the possible implications. In further cross-examination (in September 1991), he said that he had returned the card to his friend.

In his affidavit Chai said that he was the sole proprietor of Eastern Sarawak. But Exh. "P12" shows that Chai had a partner called Liaw Khink Jin. In a sense this is a minor point but it goes to show his reliability.

At NE42 Chai said that Eastern Sarawak ordered goods from Sinwan until 1985. At NE45 he said that he stopped doing business under the name of Eastern Sarawak since 1982. But what is significant is that Eastern Sarawak ceased to exist in 1979. He also claimed that for tax reasons he would change company every five years. If so why did he keep on trading under Eastern Sarawak, as he alleged, even after it ceased to remain on the register. Further, Eastern Sarawak was only in existence for three and a half years and he sold it off after owning it for less than one and a half years.

In his submission Counsel for the applicants pointed out many more inconsistencies in the evidence of the respondents, but I do not think I really need refer to them. Those that I have mentioned above are sufficient to enable me to form a conclusion on the issue.

The substantial similarity between the *AUVI* logo and the *AUVI* mark gives rise to a *prima facie* inference of copying by the respondents. The burden is on the respondents to rebut: see *King Features Syndicate Inc. v. O & M Kheeman Ltd.* [1941] AC 417 and *L.B. (Plastics) Ltd. v. Swish Products Ltd.* [1979] FSR 149. Having considered the demeanour of Chai and the various inconsistencies in his evidence, he does not appear to me to be a reliable witness. I, therefore, reject his evidence that he created the mark by joining four alphabets he found in a Japanese magazine. I find that he copied the applicants' logo and the only real alteration he made in creating the *AUVI* mark was in respect of the alphabet "I". I would like to add that in coming to this conclusion, I have disregarded the evidence in Exh. "P6" (which seems to suggest that Sinwan was only incorporated in 1980) on the ground that it was submitted rather late (in September 1991), leaving the respondents with very little time to verify the truth of the statement therein; "P6" appears to have been in the possession of the applicants since May/June 1989.

In law, there could be infringement even though the imitation is not an exact replica. It does not matter whether the size of the copy has been increased or reduced or whether the whole or part only of the original was copied. In this case both Chai and Miss Seah have admitted that the logo and the mark are strikingly similar. In this connection a rather instructive authority is the Canadian case *Motel 6 Inc. v. No 6 Motel Ltd.* 127 DLR (3d) 267 at 274.

Second Issue: Originality and Existence of Copyright

The second question that arises for consideration is whether the *AUVI* logo constituted an artistic work and thus enjoyed copyright protection under the Copyright Act 1911 which was the relevant law in force in Singapore at the time of the creation of the logo. By definition in the Act "artistic work" included works of drawing. The contention of the respondents is that the work lacks originality. They said that the logo contains nothing more than just embellishment of four ordinary alphabets. The law on this is clear. Originality in this regard does not mean novelty or uniqueness; nor does it necessarily involve inventiveness. All that needs to be shown is that the author created it and has not copied it from another and that he has expended towards its creation a substantial amount of skill or labour. What will be the exact amount of skill, labour or judgment required cannot be defined in precise terms: see Lord Atkinson in *Macmillan & Co. Ltd. v. Cooper (K & J)* [1923] 40 TLR 186 at 190.

The cases would appear to show that simplicity *per se* does not prevent a work from acquiring copyright: see *British Northrop Ltd. v. Texteam Blackburn Ltd.* [1974] RPC 57 and *Karo Step Trade Mark* [1977] RPC 255. Even drawings of things in common use such as engines

and gear boxes are copyrightable: *Nicholas Advanced Vehicle Systems Inc. v. Rees* [1979] RPC 127. I think this statement of Megarry J in *British Northrop Ltd*. at p. 68 says it all:

> a single straight line drawn with the aid of a ruler would not seem to me a promising subject for copyright. But apart from cases of such barren and naked simplicity as that, I should be slow to exclude drawings from copyright on the mere score of simplicity. I do not think that the mere fact that a drawing is of an elementary and common place article makes it too simple to be the subject of copyright.

As I see it, where an author has made use of existing subject matter in creating his drawing, it is always a question of determining whether he has put in sufficient skill and labour to justify copyright protection for his result.

Here we have the evidence of one Chua Tang Nam, who in 1976 was employed by Pro-Ads as an artist. He said that he was a member of a team of three persons who were delegated the task of creating a logo for the applicants. The team worked under the direct supervision of John Lee, the managing director of Pro-Ads, who as I have said before died in 1985. He said that the *AUVI* logo was the result of the original creative work and labour of the members of the team under the supervision of John Lee. It was evolved after having undergone many modifications, adjustments, alterations and other changes and that a considerable amount of time and effort were expended in arriving and perfecting the *AUVI* logo. Chua Tang Nam also stated that the *AUVI* logo was not copied by the team from some existing design.

The respondents did not apply to cross-examine Chua Tang Nam on his affidavit. It was only when the hearing of this case was resumed on 16 September 1991 that this Court was informed that the respondents would have liked to cross-examine Chua Tang Nam but by then Chua would appear to have left Singapore and his whereabouts are not known.

The evidence of Chua Tang Nam therefore stands unchallenged. In his final submission, Counsel of the respondents contended that the *AUVI* logo was no more that just the adoption of ordinary typefaces commonly available to the printing, advertising or publishing industry. I am afraid this submission was made without any basis whatsoever. There is no evidence that the lettering of the logo resembles any ordinary typeface. In a bundle of authorities by the respondents' Counsel some samples of trade marks were included and in one or two of them the design of the alphabets resembles that in the *AUVI* logo. But there is no evidence that the design of the alphabets in those marks came from ordinary typefaces. Further, it would appear that those marks came into being well after the creation of the *AUVI* logo. I reject this submission as being totally devoid of merit, especially when the evidence of Chua Tang Nam stands unchallenged. In any event, even drawings of typeface design were held to be protected: see *Stephenson, Blake & Co. v. Grant, Legros & Co*. [1916] 33 RPC 406 though that was a case under the Fine Arts Copyright Act 1862.

It may be pertinent to note that Counsel for the respondents conceded that the symbol of an open tape-reel used as the "dot" of the alphabet "I" in the logo is an original artistic work. Counsel for the applicants submitted that if part of the logo is original, then all the more so would be the whole of the logo.

Having carefully considered the evidence before me, I hold that the *AUVI* logo was an artistic work which enjoyed copyright protection under the 1911 Act. By virtue of the transitional provisions in the Copyright Act 1987, the *AUVI* logo continues to enjoy copyright protection under the current law. And comparing the mark with the logo, one finds that there is such a close similarity between the two that the inevitable conclusion is that one must have been copied from the other. For there to be an infringement there need not be an exact reproduction.

Counsel for the respondents went into a minute examination of the differences between the two. Differences there are but I think they are minor or trivial differences. But overall there is a high degree of similarity between the two. As I have pointed out earlier, both Chai and Miss Seah admitted that the two are similar. According to Chai, the similarity even made him angry!

Third Issue: Person Aggrieved

The respondents contend that under s. 39(1)(a) of the Trade Marks Act a person can apply to rectify an entry in the trade marks register only if he can show that he is a person aggrieved. The respondents aver that for the applicants to be an aggrieved party it is not sufficient that the applicants are the owners of the copyright in the *AUVI* logo. It is also necessary that the *AUVI* logo must have been applied to the goods of the applicants; that those goods come within the same class as those against which the *AUVI* mark is registered; and that the applicants must be trading in those goods or have an intention to trade in them. Accordingly, Counsel for the respondents submitted that assuming that this Court finds that the copyright of the *AUVI* logo vests in the applicants and that the respondents had copied the logo in working out the respondents' *AUVI* mark, those facts *per se* do not make the applicants a "person aggrieved". In those circumstances the remedy for the applicants is to institute an ordinary action for copyright infringements and not for rectification under s. 39. He further submitted that under the Act there is a distinction between opposition proceedings and rectification proceedings. In the former proceedings the party who objects to the registration of a mark need not be a person aggrieved whereas that is required in the latter proceedings because s. 39(1)(a) says so. He stressed that this distinction ought to be borne in mind when considering the cases - see for example *OSCAR Trade Mark* [1979] RPC 173 at 184. More will be said about this case later.

On the other hand the applicants' Counsel submitted that it is not necessary that their *AUVI* logo must have been used as a mark on the goods of the applicants before they could be considered to be persons aggrieved provided that they are dealing in goods falling within the description of those in respect of which the *AUVI* mark is registered. At the time these proceedings were instituted the applicants were and are still dealing in radio cassette tape recorders and loudspeakers which fall within the specification of the *AUVI* mark. For this purpose Counsel relied in particular on *KARO STEP Trade Mark* [1977] RPC 255 and *Ritz Hotel Ltd. v. Charles of Ritz Ltd. & Anor.* [1989] AIPC 38, 782.

The leading statement on the interpretation of the expression "person aggrieved" in a trade mark Act is that of Lord Herschell in *Powell's Trade Mark* [1984] AC 8 at 10 where he stated:

> My Lords, I should be very willing unduly to limit the construction to be placed upon these words, because, although they were no doubt inserted to prevent officious interference by those who had no interest at all in the register being correct and to exclude a mere common informer, it is undoubtedly of public interest that they should not be unduly limited, inasmuch as it is a public mischief that there should remain upon the register a mark which ought not to be there, and by which many persons may be affected who nevertheless would not be willing to enter upon the risks and expense of litigation. Wherever it can be shewn, as here, that the applicant is in the same trade as the person who has registered the trade mark, and wherever the trademark if remaining on the register would or might limit the legal rights of the applicant so that by reason of the existence of the entry upon the register he could not lawfully do that which but for the appearance of the mark upon the register he could lawfully do, it appears to me that he has a *locus standi* to be heard as a 'person aggrieved'.

Equally significant is this passage of Lord Watson in the same case (at p. 12):

> In my opinion, any trader is, in the sense of the statute, "aggrieved" whenever the registration of a particular trademark operates in restraint of what would otherwise have been his legal rights. Whatever benefit is gained by registration must entail a corresponding disadvantage upon a trader who might possibly have had occasion to use the mark in the course of his business. It is implied, of course, that the person aggrieved must manufacture or deal in the same class of goods to which the registered mark applies, and that there shall be a reasonable possibility of his finding occasion to use it. But the fact that the trader deals in the same class of goods and could use it, is *prima facie* sufficient evidence of his being aggrieved, which can only be displaced by the person who registered the mark, upon whom the onus lies, shewing that there is no reasonable probability that the objector would have used it, although he were free to do so.

The statement of Lord Herschell was further clarified by Lord Pearce in *DAIQUIRI RUM Trade Mark* [1969] RPC 600 at 615 as follows:

> Lord Herschell was not there purporting to do more, I think, than decide that the applicants were within the ambit of the words. In my opinion, the words were intended by the Act to cover all trade rivals over whom an advantage was gained by a trader who was getting the benefit of a registered trade mark to which he was not entitled. At common law a trader could ask the Courts to protect him from the improper use of his mark by others who would pass off their goods as his. But to do this he had to establish by cogent evidence from the purchasing public and the trade that the mark had come to denote his goods and his alone ... the general intention and policy of the Act show, I think, that Parliament intended the words to have a wide meaning. If an erroneous entry gives to his rival a statutory trade advantage which he was not intended to have, any trader whose business is, or will probably be, affected thereby is 'aggrieved' and entitled to ask that the error should be corrected.

The interpretation of the expression "person aggrieved" given by Lord Herschell was generally followed in subsequent cases. I shall refer to some of the cases relied upon by Counsel for the respondents. In *Lever Bros. Ltd. v. Sunniwite Products Ltd.* [1949] RPC 84 the plaintiffs were the registered proprietors of the mark *"Sunlight"* in respect of soap, substances for laundry use, detergents and certain cosmetic goods. However, they had only used the mark on soap. The defendants used their mark *"Sunniwite"* on a soapless detergent powder. The plaintiffs commenced the action against the defendants for infringement and the defendants counterclaimed for partial rectification to the extent that goods other than soap be struck out on the ground of non-user. Romer J (as he then was) held that the specification ought not to exclude detergents or substances for laundry use as these goods were of the same description as soap. He further held that although the cosmetic goods were not of the same description as soap, the defendants were not persons aggrieved and therefore could not claim to be entitled to insist that those goods be excluded from the plaintiffs' registration. The Judge explained his ruling on *locus standi* as follows (at p. 101):

> In the present case the defendants' sole activity lies, and has lain for some years in the past, in the region of soapless detergents. This being so, and in the absence of some evidence to support the view, I am unable to see how they can sensibly be regarded as aggrieved in respect of the plaintiffs' mark being on the register in relation to perfumery, cosmetics, preparation for the hair and dentifrices. I have already indicated my opinion that none of these products are goods of the same description as detergents, which have, so far as I am aware, almost nothing in common with any of them. If, therefore, the defendants entertain, or have at any time entertained, any notion of embarking upon an enterprise so far removed from their present one, I cannot but think that it was incumbent upon them to call evidence to that effect. This they were singularly coy about doing.

Another case relied upon by the respondents is *WELLS FARGO Trade Mark* [1977] RPC 503 which concerned an application by a Liechtenstein company to remove from the register the mark *WELLS FARGO* (in respect of printed matter, periodical publications and books) on the ground of non-user by the registered proprietors. To establish their *locus standi* as trade rivals the applicants applied, after the rectification proceedings had been commenced, to register *WELLS FARGO* as a mark for printed matter including business cards, printed invitations, playing cards and reprints of articles. The applicants also relied on the existence of litigation between the parties in Liechtenstein concerning similar matters. The UK Assistant Registrar held that whether the parties were trade rivals was to be Judged:

> in the context of the business carried on in (that) country by the applicants compared with trade of manufacturing or dealing in the goods comprised in the class 16 specification of the registered proprietor's marks.

As there was no evidence that the applicants had in fact traded in the United Kingdom, the Assistant Registrar held that the applicants were not persons aggrieved.

Next in the case *OSCAR Trade Mark* [1979] RPC 173 (which was also cited by the applicants) which was concerned with two applications for rectification of registered trade marks Nos. 792499 and 969672 (*OSCAR*) and an opposition to the proposed registration as a trade mark of the word *"OSCAR"* adjacent to a silhouette of a statuette. In the rectification proceedings two of the main grounds advanced by the applicants were (i) the registration was contrary to s. 11 of the UK Trade Marks Act (similar to our s. 15) and (ii) the registered proprietor wrongfully claimed to be the proprietor of the mark. The applicant was the Academy of Motion Picture Arts and Sciences which was a non-profit making corporation established in 1929 with the object of recognising outstanding achievements in the motion picture industry by conferring annual awards of merit. The awards came in the form of statuette trophies and had since 1931 been referred to as *"Oscars"*. So general had the word *"Oscar"* become that it had entered leading dictionaries and reference books of the English-speaking world. The statuette was executed by one George Stanley, a Los Angeles sculptor, from a sketch made by Cedric Gibbons at a meeting of the first Board of Governors of the Academy. The UK Registrar of Trade Marks, after reviewing the line of authorities, was of the view that registration of a trade mark, once effected in favour of a proprietor, "ought not to be liable to be challenged by persons who have no trading interest in the goods concerned." He held that the Academy was not a "person aggrieved" as there was no evidence that it had suffered or was likely to suffer damage to its reputation or any other damage by reason of the registrations which removal it sought. An appeal was filed against this decision but it was not proceeded with because the two marks were taken off the register by reason of failure to pay renewal fees. In any case, I ought to point out one significant aspect of the case. The Academy did not claim and probably could not claim sole proprietary rights in the word *"Oscar"*.

In *Consort Trade Mark* [1980] RPC 160, which was a case for rectification for non-user, the Registrar made this observation on the point concerning a person aggrieved (at pp. 164-5):

> ... but I do not consider that it is necessary for an applicant to show that he actually used his mark before he can be a person aggrieved. Indeed, to use the mark on goods within the registered specification (although not on goods of the same description) may very well provoke an action by the registered proprietor for infringement, and in such a case there can be no doubt. I think that the applicant for registration would be aggrieved if he could show that the registered proprietor had not used his mark in respect of those goods for 5 years or more. On the other hand, there can be little doubt in my view that an applicant for rectification cannot be a person aggrieved in respect of goods which are not only not of the same as those on

> which he wishes to use an identical or resembling mark but are not even of the same description as those goods. In my opinion the line is to be drawn at the point where the registered specifications include goods of the same description as those in which the applicant for rectification has used, or has an intention to use, his mark.

Finally, there is the local case, *Re Arnold Palmer* [1987] 2 MLJ 681. There the application to register a mark was refused because the mark was earlier registered in the names of others. The mark consisted solely of a device of an umbrella. The applicant subsequently applied to have the registered mark removed on the ground of non-user under s. 40(1) of the Trade Marks Act. The Registrar of Trade Marks who heard the matter found that the applicant was not a person aggrieved within the meaning of s. 40(1) as he was not engaged in the same trade as the respondents. Neither had the applicant shown how he might be damaged or injured if the trade mark registered in favour of the respondents was allowed to stand. The applicant appealed to the High Court. Chan Sek Keong JC (as he then was) ruled that the applicant could not succeed unless he could show that he had used his mark in the course of a trade which is the same as or similar to that of the respondents or that he had a genuine and present intention to use the mark as the trade mark. As none of these was established the appeal was dismissed.

I now turn to the two main cases relied upon by the applicants. First is *KARO STEP Trade Mark*, where the applicants were a German non-trading association which commissioned the design of the trade mark and owned the copyright therein. The applicants were the registered proprietors of the mark in Germany as an "association" mark. The mark was also registered in some other European countries. It was used on quilts. Only members of the association, and manufacturers who undertook to adhere to certain manufacturing standards, were allowed to use the mark. Under German law an association mark could be obtained by legally constituted bodies pursuing industrial aims even though they did not actually trade in goods whether as manufacturers or distributors. The respondent initially bought quilts in Germany with the *KARO STEP* mark and sold them in UK. Later the respondent imported only the quilt covers and did the filling herself in UK. In every sense of the word, the respondent was selling quilts in UK with the *KARO STEP* mark. Some months later the respondent applied for registration of the *KARO STEP* mark in UK and secured registration of the same. Thereafter, the respondent advertised quite extensively where she stressed the German connection of the quilts which she was selling. At the time, apart from the quilts sold by the respondent, there was no evidence that quilts bearing the *KARO STEP* mark had at any time been sold or advertised in UK. It was clear that the UK market in quilts was promoted and developed by the respondent. In fact, after becoming aware of what the respondent did, the applicants allowed the respondent to trade for a while before making an application to rectify.

One of the issues raised in *KARO STEP Trade Mark* was that the applicants were not "persons aggrieved". The respondent relied in particular on the fact that the applicants made no sales in UK. This argument was rejected by the Assistant Registrar of Trade Marks who dealt with the point in this way (at p. 259):

> The applicants are, it seems, responsible under the German law for ensuring that the mark is only used in trade by their members and the members of the *Arbeitskreis* to distinguish bedding which complies with specified manufacturing standards. It is evident that those authorised to use the mark are in the same field of trade as that in which the respondent is engaged. To protect their members' trading interest in the export market to the United Kingdom it seems to me right and proper that the applicants on whom the responsibility rests for maintaining the rights and obligations associated with the mark in Germany should have the locus to seek the rectification of the mark in suit.

While the respondent did appeal to the High Court against the decision of the Assistant Registrar to remove the trade mark, the ruling of the Assistant Registrar on *locus standi* was never challenged before the Judge. I should point out that in coming to that conclusion on the question of *locus standi*, the Assistant Registrar had relied on the passage of Lord Herschell in *Powell's Trade Mark.*

KARO STEP Trade Mark is significant to the extent that it seems to show that a party could still be an aggrieved person even though that party was not a trade rival of the registered proprietor in the strict sense. The applicants there were not trading in the mark although their members were.

The second case is *Ritz Hotel Ltd. v. Charles of the Ritz Ltd.* [1989] AIPC 90-546 where the Australian Supreme Court of New South Wales further clarified the meaning of the expression "person aggrieved". There the Australian Court, after referring to *Powell's Trade Mark and DAIQUIRI RUM Trade Mark,* held that the expression "person aggrieved" would embrace any person:

> having a real interest in having the register rectified, or the trade mark removed in respect of any goods ... and thus would include any person who would be, or in respect of whom there is a reasonable possibility of his being, appreciably disadvantaged in a legal or practical sense by the register remaining unrectified or by the trade mark remaining unremoved.

McLelland J then went on to say that he saw no legitimate basis for introducing into the concept of "person aggrieved" any situation based on the conditions required to be fulfilled by an applicant for registration of a trade mark and rejected the defendants' submission that:

> the plaintiff must show a trade rivalry by demonstrating that it is either in trade or has a fixed and present intention to enter trade in Australia in goods sufficiently similar to those covered by classes 3 and 26 as to be likely to cause confusion.

The significance of this latter passage becomes apparent when one notes that there the employees of the plaintiff "were preparing to give effect to their desire to make money for the plaintiff from the exploitation of the word *RITZ*" by primarily the procedure sometimes referred to as "character merchandising," in respect of as many different kinds of goods, and in as many different countries as might be practicable. He concluded:

> It may well be that the character merchandising which the plaintiff contemplates would fall short of use of the mark RITZ as a trade mark and constitute 'trafficking' in trade marks within the meaning of s. 74(1) of the Act (see *In re American Greetings Corpn.* [1984] 1 WLR 189). Nevertheless such commercial activity is not unlawful and may well be highly profitable. Activity of that kind by the plaintiff would be likely to be appreciably inhibited by the registration by someone else of the mark intended to be the subject of merchandising, or a mark of which that mark is a significant element, in respect of the same, similar or associated goods.

In our present case the applicants do not claim that they intend to use the *AUVI* logo on any goods or products of theirs. It is not disputed that the applicants are only selling goods which bear the trade marks of their foreign manufacturers. What they are saying is that the respondents have infringed their copyright in the *AUVI* logo and as such they are entitled to have the *AUVI* mark removed from the register. Further, they say that *AUVI* logo has been identified with the applicant-company and their trading activities and the continued use of *AUVI* mark by the respondents may give the impression that the goods of the respondents are those of the applicants, thus causing confusion.

I appreciate that the facts in *KARO STEP Trade Mark* are different from the present case because in that case while the applicants were not dealing with the goods in question, their members were. This aspect of the matter was highlighted by the Assistant Registrar in the passage which I have quoted above. Counsel for the respondents agreed that perhaps the applicants could have a cause of action in copyright infringement against the respondents. If that is so, I think it does not make sense to say that the applicants are not "persons aggrieved". I am unable to see why the fact that there is an alternative remedy available should preclude the applicants from being a "person aggrieved" within the meaning of the section. As Lord Herschell said in *Powell Trade Mark*, we should not unduly limit the construction of those two words. Lord Pearce in *DAIQUIRI RUM Trade Mark* also said that Parliament intended to give the words a wide meaning.

The applicants here cannot by any stretch of the imagination be considered to be someone who "had no interest at all in the register being corrected". Neither are they mere "common informers." Nor are they "persons actuated by merely sentimental notions": *Re Apollinaris* [1981] 2 Ch 186. The copyright in the logo vests in the applicants. The logo is associated with the applicant-company. They are entitled to protect their copyright in the logo.

I do not think that in any of the cases (including *Powell Trade Mark and DAIQUIRI RUM Trade Mark*) referred to above, what was stated in those judgments was meant to be exhaustive. Those cases involved alleged trade rivalry. Lord Pearce said that the words are intended to cover all trade rivals. But he did not say that the words are only intended to cover situations of trade rivalry and nothing more. I do not see in any of the cases any attempt to lay down a definition of those two words, which the legislature has, in its wisdom, deemed fit not to define. I do not think it is justified to so restrict the meaning of the two simple ordinary English words to mean only that which the respondents have urged upon me. I am fortified in this view by *Ritz Hotel Ltd*. In my judgment, whether a person has any real grievance must be looked at in the circumstances of the case. Quite rightly the law should not allow busybodies to interfere in trademark registration. But here, the applicants are certainly not busybodies; they have a genuine interest in protecting their copyright in the logo and to have the *AUVI* mark removed from the register.

Finally, I ought to allude to the fact that Counsel for the applicants has also argued that the applicants are persons aggrieved on the basis that the applicants have, through their numerous advertisements, acquired a reputation in the name *AUVI* and their logo and that the respondents, by registering their *AUVI* mark and making goods with that mark, have falsely suggested or given the impression that the respondents' business or products are connected with the applicants' business. I do not think this point has any real merit when the applicants' Counsel has conceded that there is no evidence of deception. Further, there is hardly any evidence of confusion.

Fourth issue: Legal ownership

The fourth issue raised by the respondents is that the applicants, not being the legal owners of the copyright in the logo when the trademark application was made by the respondents in September 1983, are not entitled to apply to Court for rectification on the ground that the entry in the register was made without sufficient cause. The respondents contend that the only person who could institute proceedings for rectification would be the legal owner. In the alternative, the respondents aver that at least the legal owner should be joined in the proceedings.

As I have stated above, in 1976 the applicants commissioned their advertising agents, Pro-Ads, to design the logo for them. The applicants paid Pro-Ads for it. Under s. 5 of the Copyright Act 1911, it is clear that the initial copyright in the work vested in Pro-Ads. Though it was the intention of the applicants and Pro-Ads that the copyright in the work should belong to the applicants, no formal assignment of the copyright was executed until 1988. Accordingly, the applicants concede that as at September 1983 they were only the equitable owners of the copyright. But as equitable owners they were entitled at any time to call for an assignment from the legal owners: see *Merchants Adventures Ltd. v. Griew & Co. Ltd.* [1973] RPC 1.

Counsel for the respondents agreed that an equitable owner of copyright is entitled to commence proceedings and ask for interlocutory reliefs. *Merchant Adventurers Ltd.* is the authority for that. But he submitted that an equitable owner is not entitled to ask for permanent reliefs or for rectification of the trade marks register. The authorities would appear to support this contention.

In the present case it is not disputed that Pro-Ads (and/or John Lee) held just the bare legal title to the copyright in the work. Both Pro-Ads and the estate of John Lee had on 9 May 1988, before the institution of the present proceedings, formally assigned to the applicants the legal ownership of the copyright in the logo and the right to sue for past infringements of such copyright. The assignments effectively vest copyright in the work in the applicants retrospectively. I would have thought that if Pro-Ads (and/or John Lee) could take proceedings to rectify the register as is conceded by the respondents' Counsel, so could the applicants after the assignments.

In this regard Counsel for the respondents raised a technical objection. He said what was assigned to the applicants by Pro-Ads and John Lee was the right to sue for past infringements and not to take rectification proceedings. He urged me to give a restrictive interpretation of the words "sue for infringement". In his submission these words mean taking out ordinary suits for injunctions and/or damages on account of infringements. I am afraid I am unable to accept that submission. The plain ordinary meaning of the word "sue" is to make a legal claim against another. When a copyright owner seeks rectification of the trade mark register on account that the registered mark infringes his copyright, he is no less making a claim on the ground of infringement, the only difference is that the relief he is asking is not injunction or damages but rectification of the register.

In any event, even if I am wrong in holding this view, since leave was granted to the applicants to amend the notice of motion for the purpose of adding an additional ground for rectification - entry wrongfully remaining on the register - the fourth issue is really quite academic. To determine whether the *AUVI* mark is wrongfully remaining on the register, the relevant date would be the date on which the proceedings were commenced. On that date the applicants were already the legal owners of the copyright in the logo and, therefore, are entitled to ask for rectification of the register.

Discretion

The last issue concerns the question of discretion. Counsel for the respondents submitted that even if an applicant's case is proven there is a wide discretion vested in the Court under s. 39(1)(a) of the Trade Marks Act. It does not follow that the Court must expunge the mark. The Court has the power to make such variation to the registered mark as it deems fit including the specification of the goods to which the mark relates. He also alleged that there was delay on the part of the applicants in coming to Court for reliefs. Accordingly,

Counsel urged me to exercise my discretion and vary the mark to consist simply of the four alphabets "*AUVI*", that is, a word mark. He contended that such a variation would not substantially affect the identity of the mark so as to give rise to the objection that it is a new mark: see *Kerly's Law of Trade Marks* (12th Edn.), at para. 11-60.

First let me make it plain that in the light of what I have said above, the respondents cannot claim to be the proprietors of *AUVI* mark. This would be an instance where the *AUVI* mark ought not to have been registered as provided in s. 15(1), because the use of that mark would be contrary to law, that is, infringement of the applicants' copyright: see *KARO STEP Trade Mark.* What remains is whether I should exercise my discretion, as urged upon me by the respondents' Counsel, on grounds of hardship and delay, to vary the mark from a device-mark to that of a wordmark. The test which Counsel for the respondents suggest I apply, to determine whether a variation should be sanctioned, is that laid down in s. 38 of the Trade Marks Act. The provision enables a registered proprietor to apply to the registrar for leave to "add to or alter the trade mark in any manner not substantially affecting the identity thereof."

As regards the allegation of delay on the part of the applicants in coming to Court, I would observe that the period in question was only fourteen months. Counsel for the applicants explained that the applicants needed time to collect the necessary evidence to present to Court as the logo was created more than ten years ago. The difficulties were further compounded by the fact that by March 1987, the date on which the applicants became aware of the *AUVI* mark, the principal designer, John Lee, had died and one of his executors was residing in London. I should also add that as soon as the applicants' notice was drawn to the *AUVI* mark, they asked their solicitors to write to the respondents objecting to the mark being on the register. That was done. Considering all the circumstances of the present case, I hold that there was no real delay on the part of the applicants in coming to Court for reliefs.

I accept the submission on the applicants' Counsel that even if there had been some delay in coming to Court, there is no evidence whatsoever that the position of the respondents has been substantially and adversely affected by the alleged delay. As I have found that the respondents had copied the logo of the applicants, whatever injury, if any, was self-inflicted.

In any event, delay on the part of an applicant in coming to Court for reliefs is no bar to the application: *Bourne v. Swan & Edgar* [1903] 1 Ch 211. In "*Apollinaris*" [1891] 2 Ch 186, some of the marks were removed after being on the register for fourteen years.

To vary a mark from a devicemark to a wordmark would involve a change which substantially affects the identity of the mark. The appearance would clearly be different. It would amount to allowing a new mark to be entered on the register without giving third parties a chance to oppose. I am not prepared to let the respondents have the exclusive right to use the four alphabets, *AUVI*, without requiring them to go through the normal process. In any event in the light of what I have said above the respondents have not even made out a case for the Court to exercise its discretion in their favour.

Accordingly, I order that the Trade Mark No. 4767/83 be removed from the register.

Also found at [1992] 1 CLJ 253